



HIGH COURT OF AUSTRALIA

12 May 2021

JOHN SHI SHENG ZHANG v THE COMMISSIONER OF POLICE & ORS
[2021] HCA 16

Today the High Court unanimously answered questions stated in a special case concerning the validity of s 92.3(1) and (2) of the *Criminal Code* (Cth), which criminalise reckless foreign interference, and the validity of three search warrants and corresponding orders issued in respect of suspected offences against s 92.3(1) and (2).

The plaintiff ("Mr Zhang"), an Australian citizen born in the People's Republic of China, was employed at the New South Wales Parliament. In the context of an ongoing investigation, officers of the Australian Federal Police ("the AFP") obtained search warrants issued under s 3E of the *Crimes Act 1914* (Cth) purporting to authorise search and seizure of material relevant to offences against s 92.3(1) and (2) of the *Criminal Code*. Corresponding orders relating to material seized were made under s 3LA of the *Crimes Act* following execution of those warrants.

In a proceeding in the High Court's original jurisdiction, Mr Zhang sought writs of certiorari quashing each warrant and each order together with a mandatory injunction requiring the destruction or return of the seized and copied material. He also sought declarations of invalidity of s 92.3(1) and (2) of the *Criminal Code* on the basis that they infringed the implied freedom of political communication. Mr Zhang's challenge to the validity of each warrant was on two grounds. The first was that each warrant failed to comply with s 3E(5)(a) of the *Crimes Act* because it did not identify the substance of the offences with sufficient precision. The second was that each warrant failed to authorise search and seizure of "evidential material" because of the invalidity of s 92.3(1) and (2). The challenge to each order was derivative upon the challenge to the corresponding warrant. By special case in the proceeding, Mr Zhang and the Commissioner of Police agreed in stating questions of law for the opinion of the Full Court. Because Mr Zhang accepted that each warrant was severable and the totality of the search and seizure that occurred pursuant to each warrant was authorised if the warrant was valid in relation to offences against either provision, it was sufficient for the Court to concentrate on the challenge relevant to offences against s 92.3(1). Section 92.3(1) relevantly made it an offence to engage in conduct "on behalf of ... a foreign principal" in circumstances where "the person is reckless as to whether the conduct will: ... influence a political or governmental process of the Commonwealth or a State or Territory; or ... influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty" and "any part of the conduct ... is covert".

The High Court unanimously held that Mr Zhang's argument that each warrant failed to comply with s 3E(5)(a) of the *Crimes Act* because it was "unclear" as to the identity of the foreign principal was untenable. As to the constitutional challenge, the Court found that Mr Zhang, in failing to assert that the word "covert" would be incapable of being read down to ensure validity, implicitly acknowledged that parts of s 92.3(1) supporting the offences against s 92.3(1) to which each warrant related had some valid operation. That being so, his argument that those offences do not exist was rejected without need of determining the constitutional argument he presented. Accordingly, the Court held that the warrants were not wholly invalid on any of the identified grounds and otherwise that the remaining substantive questions reserved were unnecessary or inappropriate to answer.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*